

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Applications of)
)
)
Martin W. Hoffman, Trustee-in-) MM Docket No. 97-128
Bankruptcy for Astroline)
Communications Company Limited)
Partnership)
)
For Renewal of License of)
Station WHCT-TV, Hartford, CT) File No. BRCT881202KF
)
and)
)
Shurberg Broadcasting of Hartford)
)
For Construction Permit for a New) File No. BPCT-831202KF
Television Station to Operate on)
Channel 18, Hartford, CT)

To: The Honorable John M. Frysiak
Administrative Law Judge

COMMENTS IN SUPPORT OF
PETITION FOR EMERGENCY RELIEF AND STAY OF PROCEEDINGS

Martin W. Hoffman, Trustee-in-Bankruptcy for Astroline Communications Company Limited Partnership ("Trustee") and licensee of television station WHCT-TV, Channel 18, Hartford, Connecticut, by his attorneys, hereby supports the Petition for Emergency Relief and Stay of Proceedings ("Petition") filed by Richard P. Ramirez ("Ramirez" or "Petitioner") in the above-captioned proceeding on July 25, 1997.

The Petition asks the Presiding Judge to stay this proceeding and to delete the misrepresentation issue

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designated against Astroline Communications Company Limited Partnership ("ACCLP") in the Memorandum Opinion and Order and Hearing Designation Order, In re Applications of Martin W. Hoffman, Trustee-in-Bankruptcy for Astroline Communications Company Limited Partnership For Renewal of License of Station WHCT-TV, Hartford, Connecticut, Memorandum Opinion and Order and Hearing Designation Order, FCC 97-146 (released April 28, 1997) (the "HDO") because:

- (1) bankruptcy litigation in the U.S. Bankruptcy Court, District of Connecticut, resulted in the thorough consideration and rejection of the allegations that led to the HDO; and
- (2) the failure to grant relief to the Trustee under the Commission's Second Thursday doctrine cannot be squared with the Commission's decision in MobileMedia Corporation, FCC 97-197 (released June 6, 1997) ("MobileMedia").

As discussed more fully below, his FCC counsel having now had the benefit of reviewing the exhaustive internal and other documents produced at the behest of the parties to the bankruptcy litigation, as well as requested by Shurberg Broadcasting of Hartford ("Shurberg") and the Mass Media Bureau in this proceeding, the Trustee fully concurs with Petitioner that those issues germane to the question of whether Petitioner was the genuine control party in ACCLP's application to acquire the license for WHCT-TV through the Commission's minority distress sale policy were fully litigated in the bankruptcy court and resolved in ACCLP's favor. Accordingly, for the Commission now to pursue the line

of inquiry called for in the HDO, namely, whether ACCLP misrepresented its status as a minority-controlled entity, would manifestly squander public resources and undermine the full faith and credit which must be accorded the courts.

Moreover, the Commission's decision to grant a stay of a license revocation hearing in MobileMedia to afford opportunity for a Second Thursday showing, despite grave transgressions on the part of the bankrupt petitioner, simply cannot be reconciled with its decision not to afford the Trustee the same relief in the instant case. The Presiding Judge should, therefore, stay this proceeding and delete the misrepresentation issue which is the basis for the HDO. The Presiding Judge should alternatively certify this proceeding to the Commission for its reconsideration of the applicability of the Second Thursday doctrine.

I. THE ALLEGATIONS ADVANCED BY SHURBERG ON WHICH THE COMMISSION BASED ITS HEARING DESIGNATION ORDER HAVE ALREADY BEEN ADDRESSED AND REJECTED IN FEDERAL COURT PROCEEDINGS.

The HDO is based on allegations made by Shurberg, who seeks to dismiss or deny WHCT-TV's pending license renewal application as well as a pending application to assign the license for WHCT-TV from the Trustee to Two If By Sea Broadcasting Corporation ("TIBS") in the hope that Shurberg's competing application for Channel 18 will be granted. Shurberg claims that ACCLP's representations that it qualified

as a minority-controlled entity for the purpose of benefiting through the Commission's minority distress sale policy were untrue. Specifically, Shurberg alleges that ACCLP's limited partners were not inactive participants, and held themselves out as general partners. Moreover, Shurberg questioned whether Petitioner had the 21% ownership interest and a 70% voting interest attributed to him in documents filed with the Commission. (HDO, para. 5).

Ironically, Shurberg's allegations are based in part upon a pleading filed by the Trustee with the Bankruptcy Court in which the Trustee called into question whether the limited partners had exercised such control so as to become liable under partnership law as general partners to the Trustee, who, through the civil action, was seeking to recover millions of dollars owed to ACCLP's creditors.

As the Petition details, what Shurberg has failed to acknowledge before the Commission is that the issue of whether it was the limited partners or Petitioner who exercised actual control over WHCT-TV -- the very issue which forms the basis for Shurberg's claim that ACCLP made misrepresentations to the Commission -- has been thoroughly examined in the Connecticut civil court proceeding and has been resolved in ACCLP's favor. The Bankruptcy Court concluded that the limited partners did not exercise the powers of a general partner, and that Petitioner retained authority to determine the basic policies of the station's operations, including programming, personnel,

and financial matters. The Bankruptcy Court's decision, including its factual findings, has been upheld on appeal to the Second Circuit.

Having now had the opportunity for his FCC counsel to examine the extensive documentation produced through discovery in both this and the bankruptcy proceeding, the Trustee agrees with Petitioner's assertion that the federal courts have conducted an exhaustive analyses of the very issues and facts that are now presented before the Commission, and that the judicial determination that Petitioner did in fact exercise complete control over the affairs of WHCT-TV, that ACCLP complied with the Massachusetts Limited Partnership Act ("MLPA") and the Revised Uniform Limited Partnership Act ("RULPA") in limiting the powers of the limited partners, must be accorded full faith and credit by the Commission.

Indeed, because the law has recognized through a trial and appeal that Mr. Ramirez had control of its operations, there can no longer be any question that ACCLP was candid in its representations to the Commission that ACCLP was a minority-controlled entity. As the Petition explains, the Commission's definition of "control" encompasses those who have authority to determine the basic policies of a station's operations, including programming, personnel and financial matters. Southwest Texas Broadcasting Council, 85 F.C.C.2d 713, 715 (1981). The Bankruptcy Court fully addressed each of these aspects, and found Mr. Ramirez to be in "control" of

ACCLP and WHCT-TV. Moreover, the Commission's standard for evaluating attribution of limited partners at the time ACCLP applied for and acquired WHCT-TV was based on compliance with the RULPA. Again, the Bankruptcy Court examined the conduct of ACCLP's limited partners and the operation of ACCLP under both the MLPA and the RULPA on which the state statute is based, and found ACCLP to be operating in accord with both.

In light of these findings, to launch a new evidentiary inquiry into whether "the supposedly non-active, non-minority participants whom [ACCLP] had presented to the Commission as limited partners, held themselves out to be general partners," HDO at 3, as the HDO seeks to do, runs counter to administrative and judicial efficiencies. As the Petition states, in light of the resolution of the civil proceedings, which the Commission has not heretofore considered, designation of the misrepresentation issue based on Shurberg's allegations is unnecessary, duplicative, and a waste of the Commission's resources.

The Trustee, therefore, concurs with Petitioner that, because the allegations which form the basis for the HDO have been thoroughly adjudicated and rejected in the civil court system, deletion of the designated issue by the Commission is the appropriate remedy.

II. A STAY OF THIS PROCEEDING IS MANDATED

The Trustee further supports Petitioner's assertion that a stay of the hearing to determine ACCLP's qualifications as a Commission licensee is warranted in this case. As demonstrated above, and in the Petition, the Commission's designation of this matter for hearing failed to account for the fact that the very issues that have been designated for hearing have already been exhaustively reviewed and adjudicated in the federal court system and have been resolved in ACCLP's favor. Indeed, the public interest weighs heavily in favor of a stay. Not only would it be inefficient and counterproductive to relitigate these matters, but also it would contravene the public's interest in being able to rely on the finality of decisions and satisfying the claims of creditors.

In designating this case for hearing, the Commission declined to apply the doctrine articulated in Second Thursday Corp., 22 F.C.C.2d 515, recon. granted, 25 F.C.C.2d 112 (1970). Under Second Thursday, the Commission, in bankruptcy cases, has a policy of accommodating the concerns underlying bankruptcy laws, such as the protection of innocent creditors. In essence, Second Thursday provides an exception to the general rule that a licensee may not transfer facilities involved in a hearing concerning its character qualifications unless it is found qualified to remain a licensee.

In the HDO, however, the Commission determined that "the bankruptcy policy of protecting innocent creditors is not applicable in situations where, as in the instant case, the Commission determines that other public interest considerations outweigh this policy." HDO at 6, n.6. The Commission defined the public interest considerations which merited disregard for the Second Thursday doctrine as "ensuring the integrity of our processes and our minority ownership policies," specifically, determining whether ACCLP misrepresented that it was a minority-controlled entity so as to take advantage of the Commission's distress sale policy.

The Trustee submits that, because ACCLP's alleged misrepresentations have been thoroughly examined and finally disproved in the civil proceeding, the Commission's decision not to apply the Second Thursday doctrine in the instant case is incorrect. Moreover, that decision cannot be reconciled with the Commission's action in the recently released MobileMedia Order.

In MobileMedia, the Commission granted a 10-month stay of license revocation hearings in order to afford the bankrupt MobileMedia an opportunity to make a Second Thursday showing demonstrating that means exist to prevent potential wrongdoers from realizing anything more than minimal benefits through assignment of the facilities. The Commission granted this stay *despite the fact that the licensee, MobileMedia, had filed at least 289 false notifications on FCC Form 489 and*

also filed at least 94 defective applications, grave transgressions proven by an internal investigation and acknowledged by MobileMedia. Nonetheless, while condemning the serious and broad scope of MobileMedia's misconduct, the Commission granted the stay, citing the "danger of severe harm to a multitude of innocent creditors." MobileMedia at 5.

In the instant case, the Commission attributed its refusal to apply Second Thursday to the "severity of the misconduct alleged by Shurberg." HDO at 6. The Commission's reasoning cannot lie, particularly in light of MobileMedia, however, given that the question of misconduct on the part of ACCLP at the heart of the HDO does not even remotely rival the seriousness of the conduct not merely alleged but proven in MobileMedia, particularly since allegations regarding misrepresentation on the part of ACCLP already have been thoroughly examined and rejected by federal courts. There can be no defensible basis, then, for denying to the Trustee the identical relief afforded to MobileMedia through stay of the license revocation proceeding.

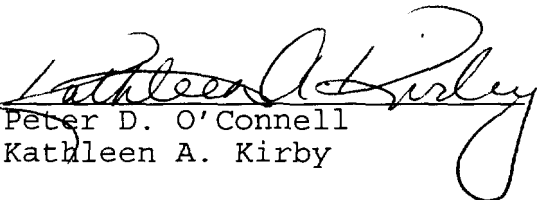
III. CONCLUSION

For the reasons set forth above, therefore, the Trustee respectfully requests that the Presiding Judge grant the Petition to (a) stay this proceeding; and (b) delete the misrepresentation issue in light of the decisions reached by the federal courts and the Second Circuit Court of Appeals.

The Presiding Judge should alternatively certify this proceeding to the Commission for its reconsideration of the applicability of the Second Thursday doctrine.

Respectfully submitted,

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August 5, 1997

CERTIFICATE OF SERVICE

I, Karen L. Jenkins, a secretary in the law firm of Reed Smith Shaw & McClay, do hereby certify that true copies of the foregoing "Comments in Support of Petition for Emergency Relief and Stay of Proceedings" was sent this 5th day of August, 1997, by first class United States mail, postage prepaid, to the following:

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